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NO _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

NELSON OIL COMPANY, INC.,

Petitioner,

-vs-

SHELL OIL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIROARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether the Temporary Emergency Court of Appeals erred in sanctioning the District Court's exercise of jurisdiction, in light of the fact that the case had already been remanded to state court, and in violation of 28 U.S.C. §1447(d).

2. Whether the Temporary Emergency Court of Appeals erred in affirming the District Court's failure to defer the substantive issues herein to the primary jurisdiction of the Department of Energy, in light of the failure of the District Court to consider Petitioner's competitive viability as an independent marketer of gasoline, and in light of the Department of Energy's statutory obligation to do so.

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PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS,

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Nelson Oil Company, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Temporary Emergency Court of Appeals entered in the above-entitled case on July 21, 1980.

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OPINION BELOW

The opinion of the Temporary Emergency Court of Appeals is unreported and is reproduced in Appendix A.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on July 21, 1980. The Petition for Rehearing was denied on September 9, 1980. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The following statutes and regulations should be considered in determining the issues herein, the pertinent texts of which are reproduced in the Appendix:

1. The Economic Stabilization Act of 1970, 12 U.S.C. §1904, note §§210, 211;

2. The Emergency Petroleum

Allocation Act of 1973, 15 U.S.C. §751 et seq. (Appendix H);

3. 28 U.S.C. §1447(d) (Appendix I);

4. 10 C.F.R. §211.13(f) (Appendix J).

STATEMENT OF THE CASE

Nelson is a Shell-branded independent marketer, or "jobber", and franchisee of Shell, an integrated refiner and distributor of petroleum products. Nelson filed a complaint against Shell in California state court, on September 22, 1978, for unfair competition, fraud and other unfair business practices in connection with Shell's efforts to horizontally control the marketing of Shell gasoline in California. Shell removed the complaint to federal court and filed a counterclaim, asserting jurisdiction pur-

suant to, inter alia, the Economic Stabilization Act of 1970, 12 U.S.C. §1904, note §210 and the Emergency Petroleum Allocation Act of 1973 ["EPAA"], 15 U.S.C. §754(a)(1).

Shell's counterclaim included an allegation that Nelson had violated 10 C.F.R. §211.13(f), which, Shell contended, required Nelson to "downward certify" or reduce the Department of Energy ["DOE"]-ordered allocation that Nelson was entitled to receive from Shell, if Nelson's customers' needs declined. Nelson and the amicus below contested this interpretation. Although requested by Shell, the DOE has never issued any order requiring Nelson to downward certify.

For the sake of clarity, it should be noted in this regard that this Peti-

tion raises only the questions of who is the proper body to determine the meaning and application of the regulation and the manner in which such determination is to be made; this Petition does not seek this Court's determination of the meaning of the regulation.

The District Court (Honorable Robert Firth), on December 27, 1978, remanded the removed complaint, as well as Shell's counterclaim, for adjudication in the state court, pursuant to 28 U.S.C. §1447 (c). (Appendix E).

Rather than proceed in state court, Shell refiled its counterclaim in the District Court (Honorable Manuel Real) as a complaint, on February 20, 1979, alleging the same claims that had appeared in its counterclaim, less one count.

Nelson brought motions to dismiss,

on the grounds that the regulatory issues should be heard by the Department of Energy, and because Judge Firth had already remanded the entire proceedings to state court. Both motions were denied.

The action proceeded to trial. At the conclusion of the trial, the court awarded Shell:

1. Money damages of $617,308.98, representing the profit of 3.02 cents per gallon that Shell would have made if it had sold the gasoline through its dealers instead of through an independent jobber.

2. Immediate reduction of Nelson's DOE allocation from Shell by 17,935,929 gallons annually (approximately 40% of Nelson's gasoline supply), without regard to the new 1977-1978 base period set by DOE regulations.

3. A declaratory judgment that Shell could give notice to Nelson of termination of its franchise (this issue is now pending in the Ninth Circuit Court of Appeals) (Appendices C, D).

Nelson appealed the judgment to the Temporary Emergency Court of Appeals ["TECA"], arguing, inter alia, that the District Court lacked subject matter jurisdiction because Shell's complaint was identical to its prior counterclaim, which had been remanded to state court, and that the regulatory issues should have been deferred to the primary jurisdiction of the DOE. The TECA affirmed the judgment on July 21, 1980 (Appendix A). On September 9, 1980, Nelson's Petition for Rehearing was denied (Appendix B).

REASONS FOR GRANTING THE WRIT

I

THE TRIAL OF THIS ACTION IN FEDERAL COURT WAS ERROR AND IN EXCESS OF JURISDICTION, BECAUSE A PRIOR DISTRICT COURT HAD REMANDED THE ACTION TO STATE COURT AND, PURSUANT TO 28 U.S.C. §1447(d), SUCH ORDERS ARE FINAL.

A. THE PRIOR ORDER OF THE DISTRICT COURT REMANDING THIS ACTION TO STATE COURT WAS RES JUDICATA ON THE QUESTION OF THE PROPER FORUM.

The TECA committed error in affirming the judgment of the District Court, because the District Court had no subject matter jurisdiction. This is so because a different District Court had previously remanded the action, including Shell's counterclaim, to state court, and that order is final and not reviewable.

The statute controlling procedure after removal, 28 U.S.C. §1447(d),

provides:

> "An order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise . . . ."

By refiling its remanded counterclaim as a complaint in another District Court, Shell circumvented the provisions and purpose of 28 U.S.C. §1447(d). This court and other courts have long recognized that once an action improperly removed to federal court is remanded to state court, it must remain in state court for adjudication:

> "[S]o far as the question of a forum in which a cause is to be litigated is concerned, the determination of a federal district court that a cause is not removable and remanding it to a state court is final. Missouri Pac. Ry. Co. v. Fitzgerald, 160 U.S. 556, 583, 16 S.Ct. 389, 40 L.Ed. 536 (1896). . . . [The Order to Remand] is

> res judicata as to any further attempts to litigate the same issues in a federal court." Chandler v. O'Bryan, 445 F.2d 1045, 1057 (10th Cir. 1971) (emphasis added).

The TECA itself acknowledged both that Shell's counterclaim had been remanded to state court and that Shell's federal complaint was identical to its remanded counterclaim:

> "The claims stated by Shell in its complaint were originally pleaded in a counterclaim against Nelson in an action charging unfair competition brought by Nelson. Shell removed the case to federal court and thereupon filed its counterclaim. That case was remanded to state court in December, 1978." (TECA No. 9-47, Slip op. at 4, n.1, July 21, 1980) (Appendix A).

The Court has always been wary of improper attempts to invoke federal jurisdiction. In American Fire & Casualty Co. v. Finn, 341 U.S. 6, 95

L.Ed. 702 (1951), this Court stated:

> "The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties. To permit a federal trial court to enter a judgment in a case removed without right from a state court. . . [would] work a wrongful extension of federal jurisdiction and give federal courts a power the Congress has denied them." Id. at 17-18 (emphasis added) (reversing judgment and ordering remand to state court).

By permitting Shell to refile its remanded counterclaim as a complaint, the District Court and TECA have sanctioned a circumvention of 28 U.S.C. §1447(d) that constitutes error, and requires this Court's attention. As this Court stated in Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 374, 57 L.Ed.2d 274 (1978):

> "It is a fundamental precept that federal courts

> are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." (emphasis added) (reversing Court of Appeals).

Since the first District Court had already remanded Shell's counterclaim to state court, there was no basis for its subsequent adjudication as a "complaint" in another federal court. The decisions of this Court and the provisions of 28 U.S.C. §1447(d) require that the action should have remained in state court and that there was no possibility of federal jurisdiction.

The Fifth Circuit has noted:

> "[O]nce the federal district court considers the proper factors and decides to remand, the action should go forward in state court without the further delay of appeal, and without regard to whether the federal district court was correct or incorrect." Robertson

v. Ball, 534 F.2d 63, 66, n.1, (5th Cir. 1976); see Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 343, 46 L.Ed. 2d 542 (1976) (rule well established since 1887).

B. THE ECONOMIC STABILIZATION ACT DOES NOT PERMIT A CIRCUMVENTION OF 28 U.S.C. §1447(d); DEFENSES BASED UPON THE ACT MAY BE HEARD IN STATE COURT.

Based upon the discussion, supra, it is clear that Shell's counterclaim should have remained in state court. The TECA, however, excused Shell's refiling of the remanded counterclaim as a complaint in federal court, stating:

> "Because federal courts have exclusive jurisdiction over the claims raised by Shell, (Economic Stabilization Act of 1970, §210 12 U.S.C. §1904 note) Shell filed an independent action in federal court following the remand in order to pursue its claim in the proper forum."
> (TECA No. 9-47, Slip op. at 4,

n.1, July 21, 1980). (Appendix A).

The TECA's statement that Shell's remanded counterclaim had to be refiled in federal court as a complaint, because federal courts have exclusive jurisdiction over issues involving the Economic Stabilization Act, is mistaken. The issue was addressed in Hampton House Management Corp. v. Saleh, 357 F.Supp. 591 (S.D. N.Y. 1973).

In Hampton, the defendant had removed the case and asserted, in a motion for injunctive relief, that federal jurisdiction existed under the provisions of the Economic Stabilization Act. Id. at 592. Examining the language of the Act, the court disagreed:

> "[D]efendant overlooks the exception expressly provided by [12 U.S.C. §1904, note §211]:
> '[N]othing in this sub-

> section . . . affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court.'
>
> "Thus, while the District Court enjoys exclusive jurisdiction to entertain an original action arising under the 1970 Act, it shares concurrent jurisdiction with the State Court to hear defenses predicated on the Act when raised in actions originally brought on other theories. . . . In the State Court action herein, plaintiff is not seeking any determination concerning any federal agency action; should defendant wish to assert such a claim, the statute expressly authorizes its adjudication by the State Court." 357 F.Supp. at 592-93 (emphasis added) (remanding case to state court).

Thus, the TECA's statement that Shell had to refile its remanded counterclaim as a complaint "in order to

pursue its claims in the proper forum" (Slip op. at 4, n.1) is contradicted by the actual language of the Act. See also Coan v. State of California, 11 Cal.3d 286, 289-90, 520 P.2d 1003 (1974).

Finally, there is no question here that Shell's counterclaim was remanded to the state court for adjudication. The remanding District Court ordered:

> "IT IS HEREBY ORDERED that the minute order dated December 14, 1978, and Order of Remand dated December 27, 1978, be corrected to show that the counterclaim of Shell Oil Company was remanded to the Superior Court in and for Riverside County, State of California, along with all other proceedings in this action." (emphasis added) (Appendix E).

In summary, it should first be noted that even the TECA has recognized that Shell's complaint is iden-

tical to its remanded counterclaim. (Slip op. at 4, n.1; Appendix A). Indeed, the only ground advanced by TECA for sanctioning the District Court's assumption of jurisdiction was, in fact, a misinterpretation of the pertinent provisions of the Economic Stabilization Act. Shell has truly had its way with 28 U.S.C. §1447(d); it has, in effect, rendered the statute a nullity, something to be ignored with impunity whenever tactical considerations might bring an advantage in doing so. By effectively sanctioning this tactic over the protests of Nelson, the District Court and TECA have so departed from the "accepted and usual course of judicial proceedings" as to require exercise of this Court's power of supervision.

C. SHELL HAS IMPROPERLY USED THE REMOVAL PROCEDURE FOR

THE PURPOSE OF FRUSTRATING TIMELY ACCESS TO STATE COURT.

This Court has traditionally concerned itself with preventing abuses of 28 U.S.C. §1447(d). The continuing need for such concern is dramatized by Shell's procedural tactics in the instant case.

After the federal District Court remanded this case to the state court, the state court granted a motion for partial summary adjudication of issues determining that Nelson had the right to sell Shell branded gasoline throughout the State of California. Nelson then filed a motion to determine the illegality of Shell's restriction on Nelson. While this motion was pending, and before hearing on said motion, Shell again removed the action to the federal District Court. Upon motion of Nelson the action

was again remanded to state court, but only after considerable delay and avoidance of a hearing on the summary adjudication motion. Shell certainly appears to have made the tactical decision to remove as a means of preventing a timely hearing of Nelson's motion.

These delaying tactics have consistently been criticized by the Court:

> "The removal jurisdiction extended by Congress works a significant interference in the conduct of litigation commenced in state court. While Congress felt that making available a federal forum in some instances justifies some such interruption and delay, it obviously thought it equally important that when removal to a federal court is not warranted the case should be returned to the state court as expeditiously as possible. If this balanced concern is disregarded, federal removal provisions may become a device affording litigants a means of substantially delaying justice.
>
> * * *

> "Congress balanced the continual disruption and delay caused by further review against the minimal possible harm to the party attempting removal -- who will still receive a trial on the merits before a state court which cannot be presumed to be unwilling or unable to afford substantial justice -- and concluded that no review should be permitted in these cases." Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 354-55, 46 L.Ed.2d 542 (1976) (Rehnquist, J., dissenting) citing Morey v. Lockhart, 123 U.S. 56, 57, 31 L.Ed. 68 (1887).

The rule that an order remanding an action to state court is final is not a harsh one; Shell is entitled to and should pursue its defenses in state court. On the other hand, however, the removal statutes should not be used as a means of preventing timely relief in state court. Otherwise, both fairness to the plaintiff, as well as the orderly functioning of the courts, are threatened.

II

THE DISTRICT COURT AND TECA ERRED IN INTERPRETING AND APPLYING THE CERTIFICATION REGULATION WITHOUT FIRST REFERRING THE ISSUE TO THE DOE, AND IN A MANNER INCOMPATIBLE WITH THE EMERGENCY PETROLEUM ALLOCATION ACT.

In considering the correctness of the District Court's interpretation of 10 C.F.R. §211.13(f) -- and, indeed, whether it was even proper for the court to attempt any interpretation without prior guidance by the DOE -- it must first be recognized that the author and primary enforcer of regulations promulgated pursuant to the authority of the Emergency Petroleum Allocation Act ["EPAA"], 15 U.S.C. §751 et seq., is the DOE. Id. §754(d); Exec. Order 11748, 39 Fed. Reg. 33575 (Dec. 6, 1973).

Assuming arguendo that the District

Court properly exercised jurisdiction in the first place (see Argument I, supra), the proper course would have been to postpone exercise of that jurisdiction and defer to the DOE for initial determination of the downward certification issue. This is especially so, given the particular circumstances of the case at bar.

The classic statement of the principles underlying the doctrine of primary jurisdiction,[1/] still vital today, was made by Mr. Justice Frankfurter:

> "[I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject

1/ For a good recent discussion of this doctrine, including numerous citations, see Terrell Oil Corp. v. Atlantic Richfield Co., 468 F.Supp. 860 (E.D. Tenn. 1978).

> matter should not be passed over." Far East Conference v. United States, 342 U.S. 570, 574-75, 96 L.Ed. 576 (1951) (emphasis added)

Preliminary resort to the primary jurisdiction of an administrative agency has been particularly useful to courts confronted with the complex regulatory scheme that has developed under the EPAA. See, e.g., Terrell Oil Corp. v. Atlantic Richfield Co., 468 F.Supp. 860, 865 (E.D. Tenn. 1978) (staying district court action pending review of issues by Federal Energy Administration); Orange & Rockland Utilities, Inc. v. Howard Oil Co., 416 F.Supp. 460, 466 (S.D. N.Y. 1976) (staying trial until FEA has opportunity to rule on interpretation of regulations); Eastern Air Lines, Inc. v. Mobil Oil Corp., 403 F.Supp. 757, 759 (S.D. Fla. 1975) (staying action pending interpre-

tation of regulations by FEA).

It is significant that, despite Shell's repeated attempts to obtain a DOE order requiring Nelson to downward certify, for the same reasons argued by Shell before the District Court and the TECA, the DOE determined not to issue such an order.[2/]

The reason why the District Court should have stayed the proceedings pending an explicit determination of the certification issue by the DOE, is indicated in the provisions of the EPAA. Under the Act, 15 U.S.C. §753(b)(1)(D), DOE is charged with providing, "to the maximum extent possible", for the:

> "Preservation of an economically sound and competitive petroleum industry . . . and to preserve the competitive viability of independent re-

2/ TECA No. 9-47, Slip op. at 4, July 21, 1980 (Appendix A); R.T. Vol. 3, pp. 545-47.

finers, small refiners, non-branded independent marketers, and branded independent marketers." See Exxon Corp. V. Federal Energy Administration, 417 F.Supp. 516, 522 (D. N.J. 1975); Ashland Oil Corp. v. Federal Energy Administration, 389 F.Supp. 1119, 1126 (N.D. Cal. 1975).

The singular importance of this Congressional mandate is manifest in the legislative history of the EPAA. The Act was designed to correct the shortages and dislocations in the petroleum distribution system, resulting, in part, from the refusal of the major oil companies to follow a voluntary program aimed at sharing the supplies of scarce energy resources. See H.R. Rep. No. 93-531, 93d Cong., 1st Sess. (1973); reprinted in [1973] U.S. Code Cong. & Admin. News 2582, 2587-89; see generally Mobil Oil Corp. v. Federal Energy Administration, 566 F.2d 87 (TECA, 1977).

As seen from the explicit objectives of the Act, as mandated by Congress, the DOE must consider various factors in the course of its deliberations, before a particular regulation may be enforced in a particular context. Primary among these factors is that of preserving competition.

Nelson introduced internal Shell memoranda, in its pending state action, demonstrating that Shell's foremost concern throughout this dispute has been to curb the competition of Nelson in southern California.[3/] Given the objectives of the EPAA, it is more than likely that the reason why the DOE refrained

3/ Exhibits "D", "E", and "F" to Nelson's Memorandum of Points and Authorities in Support of Motion for Partial Summary Adjudication of Issues, Nelson Oil Co., Inc. v. Shell Oil Co., et al., Los Angeles Superior Court No. C 271545.

from giving Shell the relief it sought (which the District Court nonetheless granted) was precisely because of the competition generated by Nelson.

This position is underscored by the amicus briefs submitted to the TECA by the Society of Independent Gasoline Marketers of America. The amicus demonstrated that the District Court's interpretation of 10 C.F.R. §211.13(f) would adversely affect not only Nelson's ability to meet its supply obligations under other DOE regulations, but also the needs of Nelson's customers and the general public. This result is, of course, exactly the opposite of that which the EPAA was enacted to prevent.

In these circumstances, it was reversible error for the District Court to render judgment based upon its interpre-

tation of a DOE regulation, without the initial guidance of the DOE. There was no consideration given to the effects on competition or the needs of Nelson's customers and consumers in general. Finally, the District Court's action appears to contradict the course chosen by the DOE. This latter point, itself sufficient to require deferral of the certification issue to the primary jurisdiction of the DOE, is all the more significant because, as the District Court and the TECA were informed by Nelson, the DOE is currently engaged in rulemaking proceedings that are considering generally the question of downward certification. 44 Fed. Reg. 69962.

CONCLUSION

The District Court had no jurisdiction over the instant case because the

entire proceedings had already been remanded for adjudication in state court.

Even if the District Court's assumption of jurisdiction is deemed proper, for the sake of argument, its judgment, and the TECA's affirming of the judgment, constitute reversible error. This is because the Court's interpretation and application of 10 C.F.R. §211.13(f) is inherently incompatible with the requirements of the EPAA, 15 U.S.C. §753 (b)(1)(D). Assuming the District Court had jurisdiction, it should have stayed the proceedings and deferred the question of the meaning and application of the certification regulation to the DOE. This is particularly so because the DOE is currently in the midst of rulemaking proceedings on the subject, is the author and prime enforcer of the regulations,

and because, despite Shell's requests to do so, has refrained from ordering Nelson to downward certify.

For these reasons, Petitioner respectfully requests this Court to reverse the judgment and dismiss Shell's action, or alternatively, to reverse the judgment with directions to stay further proceedings pending a determination by DOE as to the certification requirements.

Respectfully submitted,

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